IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN\*
STATE OF COLORADO

Criminal Action No. C-1616

MEMORANDUM OPINION	AND	ORDER	(Re: Motion to Strike the Death Penalty From Consideration)	
THE PEOPLE OF THE STATE OF COLORADO,	Plaintiff, )	vs.	THEODORE ROBERT BUNDY,	Defendant. )

deputy district this case. The motion was advisory unusual punishment pursuant to the Eighth and Fourteenth Amendments The People were Strike Defendant represented himself and was assisted by James F. Dumas, represented by Deputy District Attorney Milton Blakey, Esq. of case on numerous and On May 16, 1977, the defendant filed a Motion to acting as Ninth Judicial District for the purpose of cruel America. B Fourth Judicial District, who had been appointed as including violation of the prohibition of again on June 23, 1977, at the time was this the Constitution of the United States of the Death Penalty from Consideration in Deputy Public Defender, who 7, 1977 and defendant the in the on June for grounds, attorney argued to

thereof, of Court has considered the motion and argument and, on the basis counsel following opinion and order. and the briefs filed by The theissues

degree The defendant is charged with the crime of first pursuant Colorado, State of murder under the laws of the statute which provides:

(1)with the first degree.

of murder in tiberation and w the crime of murder After deliberation commits the crime if: (a) After deli "18-3-102. person degree

Order of entry to \*Transferred to El Paso County prior

OL (1973)other person 18-3-102 person that of C.R.S. e death of death the the causes person; another amended of as

PI felony. one class a is degree first the in Murder

this or to to death appendix jury separate as amended. sentenced to trial the d the in felony 16-11-103 (1973), before in full pe one should be conducted class forth defendant Ø set conviction of C.R.S. is to and the is lengthy hearing imprisonment. whether Upon is sentencing determine statute opinion life

Fourteent nodn constitute penalty and Eighth charged would death States. the the o£ United impose violation is the he to which of that in Constitution with punishment contends crime Defendant to the the unusual of Amendments conviction and

(1976)punishment. procedures sentence recent 2909 punishment punishment in Ct. the the and unusual 238, Court that If S s. 96 the Supreme sense. risk 1 æ 408 whether capriciously, cruel substantial the Eighth Amendment Georgia States is 1 determine it the United > excessive, or d Furman Georgia create supra arbitrarily guidelines to of Georgia, sentence unusual. in is > Decisions Gregg punishment unusual imposed provide and (1972);> imposing Gregg and cruel be the cruel 2726 See for If

sever (1977)involves the > to 2861 Gregg is proportion it t it S.Ct. See because or because 97 crime, of either out pain of the adult woman grossly S excessive of 0 severity or wanton infliction be Georgia, be an to may the held of rape to Punishment > sentence was proportion Coker of crime unnecessary In the of death of

puni unusual and cruel of prohibition Amendment Eighth

progress 590, the Dulles standards "But S.Ct. which is not conclusive the draw mark 78 supra。 Trop 86, man must of that Ct. perceptions Georgia, U.S of Amendment Amendment. S are decency of 96 dignity 356 sanctions , 2925 Dulles, οĒ "(t)he in Gregg clear that public 'the concept underlying the Eighth standards at p. to criminal accord with Trop cited Georgia, evolving society." U.S., decency with respect static also make must also > 356 Gregg the maturing from ο£ not penalty 101 cases meaning 'basic ď supra d

offense supra unusual death penalty supra; Florida, an 2960 (1976); and Murder is Georgia, cruel > the constitute Proffitt > S,Ct, (1976). circumstances, Gregg 96 supra; 2950 does not circumstances, S.Ct. Georgia, S.U appropriate penalty 96 > supra under all Florida, The death Gregg under u.s Texas, > imposed. punishment for which, > Jurek

to plurality 18 penalty the of the offense death Carolina, record by stated the the and of North whether is character circumstances 4 ·H > case, deciding Woodson the that of of the required, In consideration the process and S.Ct: (1976)offender 96 constitutionally 2978 of In imposed, 2991 individual S,Ct. ь. 96

consideration 100 sentencing policy underlyi constituti and at offender inflicting simply enlightened we believe for humanity 356 U.S Ø individualizing as requires (plurality opinion), required (plurality opinion) offense Dulles, of imperative, process respect e particular of the nran Tropp v. reflects of practice fundamental constitutional thegenerally part Amendment, of prevailing indispensable ty of death." circumstances the character at 597 determinations B cases than Eighth the S.Ct. penalty capital the 'While 78

the first degree of premeditated homicide character and record offense for penalty mandatory the of and regard to the circumstances deliberate the death felony murder, without the any or statute making included offender which individual murder,

procedures degree murder, Stanislaus Roberts v ٥ of Harry Roberts narrow category where duties, peace the intent if which even Washington Even sentencing of OL In Harry officer who was engaged in the performance of his lawful record specific first And fireman for supra the penalty is unconstitutional. crimes statute relates to the the character and of S.Ct. 1993 (1977); the S.Ct. 3001 (1976) 3214 (1976). the offense, bodily harm upon, a a categories Carolina, a human being when the offender has if the exists limits S.Ct. North drawn of infirmity S.Ct. 16 statute consideration of the circumstances 1995 of 96 16 Woodson v. to narrowly 96 to inflict great death penalty 906 constitutional death penalty ď u.s. u.s. at of unconstitutional, imposed said, 428 imposition not permit offender and mandatory Louisiana, Louisiana, Court Louisiana mandatory Or þe same killing kill, to the the is

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regarded special interest peace incorrect of circum reasonably believed provided prior examples extreme the exist Ø that the murder victim was who Circumstances of in other guard any of servants re all ex killing regular duties may can or it existence of to drugs, alcohol circumstances Ø But are considered relevant absence is order e public in order the conduct There property. officer. attend the these conviction, the Inline... ... lives circumstance, for his offender, no mitigating facts which might his and a police to offender fact their performing affording protection other persons and which are justification thethe risk is the sure, aggravated that victim youth of regularly must stances which officer mitigating suppose dictions." of the "To moral the safety péace

either unconstitutional," Because of that consideration to its l last term, it is essential decision allow for considera consideration offense. relevant repeatedly in Roberts\* and particular be is it circumstances may allow factors, offender or the not does particularized mitigating companion cases decided the capital sentencing d al sentencing mitigating cir emphasized statute particular Louisiana "As we whatever

said: is where it S.Ct., 2958 of 96 supra, at p. Texas, , > Jurek

before jury have about the is that the information is essential relevant What is e possible "What

<sup>\*</sup>Stanislaus Roberts v. Louisiana, supra.

law . Texas will be determine. evidence it must a all such fate that clearly assures tadduced."

open constituleft Harry p. person situation at pass supra, and law" Q by 2, might Ø killing d Louisiana, footnote such such penalty that justify intentional 1995, suggested > death Roberts may p. mandatory at unique problem that nodn Ct. It Harry supra, Š based sentence. 97 in d Louisiana, of whether Court where 5, life footnote muster question = > d presents serving Roberts 1996,

statutes. Texas penalty circumstances > Jurek penalty death certain supra; death mitigating Florida, the mandatory of constitutionality consideration of > Proffitt striking down upheld the permitted supra; Although Georgia, which has Court statutes Gregg supra the

circumstances and The and of Constitution, individually statutes scope of of mitigating the determination purpose and Texas them. in determining considered States to of and the Florida compared the United evidence for pe circumstances will statutes instructive Georgia, pe. for which then states mandated by those will under the are three of mitigating purposes statute under penalty are these received which procedures The Colorado of appropriate evidence evidence be the

### Florida:

with trial, which jury bifurcated same the ø for before provides place statute take to Florida stage determined guilt. sentencing The the

circumstance aggravating circumstances: eight contains seven mitigating statute The Florida following the and

prior of significant history has no defendant activity The "(a) criminal

defendant emotional the while Or committed capital felony was committee influence of extreme mental the disturbance under

participant in the defendant's act. the d Was victim The (0)

lant was an accomplice in the capital another person and his participation defendant was to committed by consented minor The relatively or (q) conduct felony

under or duress extreme another person acted under of domination defendant substantial The (e)

the appreciate conduct conform his to the defendant o f conduct capacity his criminality of The

crime." the time of impaired. at the w was substantially is of the defender law age requirements of The

cited statutes, cr. 2965 supra, Florida 1976-1977), Flott v. Florida, 6) (Supp. 197 of Proffitt (g) The a 921.141(6) Footnote 6 on

presented

pe

exist...which outweigh include Florida statute, quoted in Proffitt v. (Conclusion to on and must sentenced circumstances found to exist; and...(b) ased to Court in Proffitt directed specified sentencing added). considerations, whether the defendant should be "Evidence may sufficient mitigating circumstances jury is to certain legislatively and mitigating circumstances." (Emphasis to The Supreme relevant stage, 96 S.Ct.) the United States sentencing or death." deems 2964 of matter the judge the relating (imprisonment) ď At aggravating "(w)hether at stated by supra, any

State, aggravating the Florida sentence is imposed, the trial court must The trial court must then weigh and mitigating circumstances in imposing statutory Tedder v. > sufficient statutory quoted in Proffitt insufficient reasonable person could differ," are 1975), that there fact S.Ct. that (Florida; of sentence of exist and 96 death findings aggravating of 910 ou 2965 B 908, virtually circumstances ΙĘ make written bo Ø suggesting So.2d statutory at sentence。 supra,

facts

jury recommendation of life

following a

sentence

sustain

to

In order

vote and is advisory only.

majority

The jury determination

S,Ct.

96 Jo

2965

at po

supra,

Florida,

convincing

and

clear

death should be so

at p. 2920 of 96 S.Ct.

recommendation circumstances otherwise jury quoted consider of beyond death the one death and the scope substantial statute, Gregg is circumstances if specify the exist to recommendation is circumstances The only aggravating binding evidence he may introduce, impose jury is stage. to Georgia jury must imposed S.Ct. accorded found to the guilt ಥ In determining sentence, the aggravating 96 imposes elects statutory is evidence..." pe or mitigating of The is may circumstances its 2921 defendant evidence adduced at jury then sentence supra if (10)Ъ OL jury found The at the circumstances of Georgia, aggravating the supra, types of the death statute. circumstances statutory aggravating any supported by law, and law and the Georgia, Gregg v. doubt case to the the and may consider the nonstatutory "any mitigating supra. in Under Georgia authorized by sentence, reasonable be aggravating as delineated sentence. latitude Georgia, Texas which of

types specific five to capital homicides serious homicides limits Texas especially

following with evidence jury which trial, the relevant answer a bifurcated same sentencing stage, any to the then required take place before for statute provides jury is the stage to At The Texas determined guilt. questions: produced sentencing The pe three

deliberately death of that defendant committed the that the deceased was expectation t of result; deceased conduct would the reasonable the death of another Whether the or the [] with deceased caused

defendant constitute the a probability that the and to society; of is acts there commit criminal threat Whether continuing (2)would

of conduct was unreasonable by the deceased." whether the supra, Texas, by the deceased on, if any, h evidence, any, > Jurek provocation, the raised by tling in killing in quoted response to the statute, S.Ct ΙĘ defendant 3 Texas of 96

each mitigating the verdict conduct would cause or create a grave eight statutory aggravating court must findings minor nonexistence of The eighth relates to that inability relatively conduct or to (5)(1973)exists and combination of statutory life Ιŧ the the age of 18, (2) the statutory mitigating and aggravating factors. exists, Jo 16-11-103(2) in offense committed by another and verdict as to the existence or The factors law, (3) duress, (4) penalty on the nature of the offense; the appreciate wrongfulness of factors imprisonment. other under statutory mitigating æ Seven of the C.R.S. crime involving death. Any statutory aggravating (1) C.R.S. 16-11-103 (1973) defendant..." that his life summarized as: requirements of another。 to to ಭ defendant foresee sentence for the capacity to a or the to conviction render of þe of the factors focus participation of death reasonably to that none the Ø may to in people death. of conduct factors risk of

offender the crime, which In experienced, circumor of Defendant's criminal record and record of the individual family of holding at defendant's personal background and the age factors an plurality no past contributions to of OL the being under and background have time other just 18 course of the the indispensable part and in the Whether defendant is by than mental condition at thereof said Under the Colorado statute, supra, was His lack character relevance. reflect defendant's character it Carolina, or death, relevance. constitutionally remorse only aspect of the adult has no of considered. North of penalty his stances, other thereof has no consideration S.Ct: community, the pe

to significance accords no that process A

te punish-mitigating of humankind. offense offense members individual ultimate subjected or designated as the particular of of compassionate but frailties the the beings, death. pe firing of d to of record of diverse mass of human convicted penalty in the circumstances possibility undifferentiated and from consideration uniquely individual the the character from persons of the faceless, undifind infliction stemming the a11 death offender or treats excludes of as blind not

defensuggesting use at mitigating sentencing determination answer of mitigating individual prescribed evidence Direct of to arrive The Florida that virtually facets Flori allow the advisory determinative jury is facts of to the plan of that the case, coin, many mitigating circumstances necessary to develop side uniquely factors evidence the Texas evidence an all of The narrow scope can find the available to juries in Colorado at sentencing of death or life imprisonment. capital a marked contrast other face of part and convincing nse and Texas turn being the mitigating ಥ that of by which important Direct from the as in the ಥ introduction defendant statutory in uses standards imprisonment unless it Georgia stage in jury. jury the process a death penalty Viewed an clear person could differ. answers capital case presents relevance to is sentencing and record of the Georgia Colorado's the satisfy constitutional Florida, in jury SO patterns. In Florida, latitude such death to be the advisory sentence of part of the summary, the questions, by courts cannot impose human being have no by law in Colorado, is Texas substantial at evidence of life sentence important which of circumstances reasonable character sentence. In and sentence statutory sentence ij evidence to that Georgia the an stage rigid the of is by

constitutional range broad of possibility d pe of to introduction presumed the to is Consideration has been given permit statute to The statute evidence. Colorado mitigating the struing of

factors unconstitutionality supra. (1972)constitute impermissible to The a11 Prante, jury's function is to determine whether any of these mitigating use would evidence Any attempt to construe the Colorado statute to permit consideration and use of mitigating P.2d 1083 relevant factors. There would be no legitimate preserve its constitutionality if evidence not relevant to the statutory mitigating factors > of See People See Woodson It 4.93 found unconstitutional only if its explicit in authorizing presentation statutory mitigating and aggravating could put evidence in mitigation not Stanislaus enactment. 177 Colo. 243, and would doubt. nullification. S.Ct.; S.Ct. legislative reasonable 3007 of 96 the statutory mitigating factors. statutory pattern 96 See People v. Prante, 2990 of or aggravating factors exist. impermissible jury amendment of the construed to B supra, at p. at p. is established beyond can be supra, violence to the The statute is bearing on the which the jury must be Louisiana, statute possible. Carolina, judicial invite

the and unusual punishment in violation of the Eighth and Fourteenth Amendments imposition of the offense Whether cruel of America. the for constitute it is concluded that to Colorado statute States charged would the United sentence pursuant Accordingly, defendant is Constitution of the which the

to unnecessary is standard a higher Colorado Constitution imposes consider。

sentencing but briefly which he permissible above, considered Defendant has urged other bases upon conclusion expressed d could not become will be These the case. sentence view of alternative in his that the death in detail

# Vagueness of Statutory Mitigating Factors:

2969 factors challenge and ь. at the statutory mitigating raised said same circumstances was The Court The except for age, are too vague to be applied. supra. contends that similar mitigating Florida, ۲. Proffitt Defendant strikingly rejected in S.Ct: to of

commonly þe may se questions and decisions me on more line-drawing than is fact finder in a lawsuit." these ದ Luey require require required of a "While

96 2957 of Texas, supra, at p. Jurek v.

jury the guide to standards death: objective the penalty of to provide of imposition

stated to the availability Supreme appellate review, limitation of evidence in mitigation, crime which is unnecessarily "depraved", separately seems States with be to C to provide objective standards final above, only aggravating cruel has the United for standard and other objections Florida defendant imports objections the substituted considered an especially heinous, is the construed, be vague (1973).construed pitiless  $\mathbf{The}$ "atrocious" is argument, could be contended to 16-11-103(6)(i) factors. SO allocation of burden of proof conscienceless or Court has As the vagueness in to the victim, argument of failure statutory mitigating that offense Except as Supreme except C.R.S. committed the of a variant of the Florida reasonably torturous manner." at to

construed, Proffitt duty of impermissibly vague the standard that "the defendant knowingly not standard found as so in the provides inadequate guidance to those charged with the capital cases." See Gregg v. 96 S.Ct. The Court in Proffitt also ಥ that the provision, great risk of death to many persons,", penultimate aggravating circumstance (1973). 2968 of 96 S.Ct. recommending or imposing sentences in C.R.S. 16-11-103(6)(h) cannot say supra, at p. Court held that "We 2938 of Q the

## failure to provide for appellate review:

was considered important to the validity of the Florida system in Proffitt v. Florida question whether In Florida, where they jury makes a nonbinding sentencing recommendaon its own threat comparison necessary to determine proportionality aggravating for imposing the death penalty Texas too has appellate review of the jury's decision, includes a prediction of probabilities that the defendant woul sentencing society, Under the Colorado system, the appellate courts factors in many cases would inhibit the appellate court from given no legislative authority to review for proportionality clear. commit acts of violence that would constitute a continuing to be this similar review role the availability sentencing substantial initiative without specific statutory authority, and of sentences all The limited evidence relevant to the mitigating and elaborate jury had the at trial in Colorado are not the B considered Georgia's findings at assuring proportionality that there is briefs, supra, in which the state supreme court took a the validity of the procedure the jury pointed out in appears review of Court murder It Georgia, the for evaluation and sentences, degree appellate procedures authority, the supra. tion, Gregg

another capriciously imposed to infirm for necessary assure time this DW10 to view their extent the statute has been found adequate guidelines at the or review procedure is arbitrarily the Colorado appellate courts will pursued to view of the absence of this issue will not be definite determination, not be fact that Colorado appellate death penalty will the and in of reason, ಡ make the H

tate compelling B 7 less fulfills Ø by Failure to show that the death penalty fulfilled not be could which interest

interest the process 1.8 government sentence due substantive the death compelling that that d further demonstrate argues to Defendant means state restrictive the

punishment that that the and constitution was held supra, it the invariably violate Georgia, o N Gregg not does In death

crime selected least the the to penalty select disproportionate 2926 the to legislature as long SO or p, possible inhumane at the S.Ct. require penalty cruelly 96 not involved." not

for murder under the procedure prescribed by Georgia for extent constitutional well not the is argument, to upon the United States Constitution, went on to hold the death penalty defendant's Thus, imposition. Court founded penalty

fundamental show constitutional to an compelling process analysis。 compelling attempt Ø as to a due fundamental d process characterization of life support the infringement and to to realize that demonstrate subjected to strict scrutiny under then proceeds a substantive due B Infringement of to This requires the state analysis less restrictive means proceeds from the Defendant urges The interest to constitutional right. interest. right must be absence of government government analysis. analysis

from murderers available declaration of the of imposition of course the restrictive means analysis has been used by in the society the Massachusetts of murder committed invalidating the interest to protect the least under in Such an not rape Court crime government 1.8 attempted penalty Supreme for the murders. the death the death penalty Massachusetts an OL rape rights. d

analyzed becourse, construing The United States Supreme Court plurality has not such it O£ It is unnecessary to embark on and d analysis in supra. in view of the conclusion reached above, proof beyond so absent the necessity therefor. Gregg v. Georgia, courts are free to adopt such due process concepts of such terms, presumption of Constitution. in unwise to do of issue and Violation Colorado analysis Colorado the

innocence: doubt

constitution affirmative the position in their preponderance to of cases factors if this No the People Nothing stage, is perceived of aggravating Even aggravating circumstances burden negation ಥ requiring Stanislaus Roberts penalty can be borne by establishing such matters by of mitigating factors. proposition. is B take such constitutional infirmity including establish the from cases stage. that The People at this circumstances doubt they have the burden to sentencing their case, Woodson, of argues reasonable required in establishing support requirement. existence the The defendant Jurek, of eliminating mitigating in at every element evidence, no ಡ negate the directly beyond procedure Proffitt, d such that defenses, cited suggests the d brief

found the Based upon the foregoing Memorandum Opinion, it of for imposition statutory procedures Colorado the

doubt; penalty violate the prohibition against cruel and unusual punishment under the United States Constitution beyond a reasonable accordingly,

IT IS ORDERED THAT the motion to strike the death penalty from consideration in this case be granted,

for bill Defendant has moved for a bill of particulars with wi11 found that the motion to the aggravating circumstances upon which the People based upon the foregoing order, it is of particulars is moot.

Done this 27 day of Orember

1977.

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BY THE COURT:

District Judge

the Death Penalty From Consideration) Order and to Memorandum Opinion Strike Bundy to > -Appendix Page C-1616 People Motion

of guilt of a defendant of a class I felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted by the conducted

before the trial judge.

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sentencing hearing any information relevant to any

aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(a) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(b) of this section.

(c) of this section (5) of this section exist and that one of the factors set forth in subsection (6) of this section do exist, the more of the factors set forth in subsection (6) of this section do exist, the more of the factors set forth in subsection (6) of this section of the aggravating factors set forth in subsection (7) of this section exist or that one or more of the mitigating factors tion (6) of this section (7) of this section (8) of the section of the aggravating factors set forth in subsection (7) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdert is not unanimous, the jury shall be dischauged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if sentencing hearing results in a verdict or finding that at the time of the

offense:

(a) He was under the age of cighteen; or

(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress

as to constitute a defense to prosecution; or (d) He was a principal in the offense, which was committed by another but his participation was relatively minor, although not so minor as to constitute the participation was relatively minor. tute a defense to prosecution; or

## Imposition of Sentence

16-11-103

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results

in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state bean occurred

the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or within this state; or

(b) He killed his intended victim or another, at any place within or without

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or (d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or
(f) He committed the offense while lying in wait. from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive or incendiary device means:

a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone; or (g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or (h) In the commission of the offense, he knowingly created a grave risk (I) Dynamite and all other forms of high explosives:
(II) Any explosive bomb, grenade, missile, or similar device; or (III) Any incendiary bomb or grenade, fire bomb, or similar device, includge any device which consists of or includes a breakable container including flammable liquid or compound, and a wick composed of any material hich, when ignited, is capable of igniting such flammable liquid or com-

of death to another person in addition to the victim of the offense; or (i) He committed the offense in an especially heinous, eruel, or depraved

Source: Repealed and reenacted, L. 74, p. 252, § 4.

Editor's note: This section became effective January 1, 1975, and applies to offenses occurring on or after said date.

## IN THE DISTRICT COURT

## IN AND FOR THE COUNTY OF PITKIN\*

## STATE OF COLORADO

Criminal Action No. C-1616

MEMORANDUM OPINION	AND	ORDER	Motion to Strike the Death Penalty From Consideration)	
			(Re:	
THE PEOPLE OF THE STATE OF COLORADO,	) Plaintiff, )	vs.	THEODORE ROBERT BUNDY,	Defendant. )

been appointed as a deputy district this case. The motion was unusual punishment pursuant to the Eighth and Fourteenth Amendments acting as advisory The People were filed a Motion to Strike Dumas, represented by Deputy District Attorney Milton Blakey, Esq. of case on numerous and and was assisted by James F. Ninth Judicial District for the purpose of cruel to the Constitution of the United States of America. including violation of the prohibition of 23, 1977, at the time was this 16, 1977, the defendant June the Death Penalty from Consideration in again on had Deputy Public Defender, who Fourth Judicial District, who Defendant represented himself argued on June 7, 1977 and for the defendant, On May attorney in the grounds, counsel

thereof, of argument and, on the basis Court has considered the motion and counsel and the briefs filed by counsel the following opinion and order. The

degree The defendant is charged with the crime of first of Colorado, pursuant State the under the laws of which provides: statute

the f with first degree. and of murder the crime of murder After deliberation the in commits the if: (a) After "18-3-102. person degree

Order Jo entry to prior \*Transferred to El Paso County

or (1973)other person 18-3-102 a person Ś e death death the the causes person; himself, he another amended

PI felony one class Ø is degree first the in Murder

this or to to death appendix jury separate amended. trial to sentenced the the felony, as in before (1973),full should be one in conducted 16-11-103 class forth defendant a set of þe C.R.S. is conviction to and the is lengthy hearing imprisonment. whether Upon is sentencing determine statute opinion life

and Fourteent nodn constitute penalty Eighth would death States. the charged the of United impose violation is the he to which of that in Constitution with punishment contends crime Defendant the the unusual Amendments to of conviction and

(1976)punishment. procedures sentence 2909 punishment 92 punishment in Ct. the the and unusual 238, Court ΙĘ that S 96 S the Supreme sense. risk n Ø 408 whether capriciously, cruel substantial Amendment Georgia the United States is 1 to determine it > the Eighth excessive, OY B Furman Georgia create supra arbitrarily guidelines of sentence > is Georgia and unusual in unusual Decisions Gregg punishment imposed provide and > (1972);imposing Gregg cruel pe thecruel years 2726 will See be

sever Georgi (1977)grossly involves the > 2861 to Gregg is proportion it 1. t S.Ct. See because or because 16 crime, of either out pain of the woman, grossly S excessive n of the severity adult wanton infliction be þe Georgia to an may held of rape to Punishment was > proportion Coker of or sentence crime sary In the supra out of puni unusual and of cruel prohibition Amendment Eighth The

progress 590, Of the Dulles "But S.Ct. standards is conclusive draw its the which mark 78 > supra Trop must man' 98 of that not .Ct perceptions S Georgia, Amendment dignity of underlying the Eighth Amendment. S are ency 1 96 356 of sanctions dec Dulles, > 2925 of. "(t)he public Gregg 'the standards ф, respect to criminal > in at accord with clear that Trop concept. cited Georgia, evolving society." , S., static also also make 1 > Gregg 356 the must concept maturing Ġ from of decency with not =. penalty 101 cases meaning 'basic р. Ø our at of ¥

offense supra Jurek death penalty may and unusual supra Florida, an (1976); Murder is Georgia, cruel 2960 > the constitute Proffitt S,Ct, > appropriate circumstances, (1976)Gregg 96 supra; not 2950 circumstances, does S.Ct. Georgia, n.s penalty 96 Gregg V. supra under all death Florida under u.s Texas, The > punishment for which, imposed Proffitt > Texas, Jurek

to plurality is S death penalty u. the of offense and record Carolina by stated thethe of deciding whether of North character is circumstances u .1 case, Woodson consideration of the that the required. In the process and S.Ct: (1976)offender 96 constitutionally of 2978 In imposed, 2991 individual S.Ct. ь. 96

100 consideratio sentencing underlyi constituti policy and at offender simply enlightened inflicting we believe U.S. humanity a individualizing 356 as requires individual particular offense Dulles, for of imperative, the process respect ent, see Tropp v. D (plurality opinion) and record of the i reflects of uring practice generally refle fundamental constitutional of the indispensable part Amendment, circumstances of prevailing the character death. determinations Ø cases than of Eighth the S.Ct., penalty capital the rather While ally the the of 78

the and degree of premeditated homicide record first offense and for death penalty mandatory character the of deliberate and the circumstances regard to thethe any without offender or statute making which included felony murder, individual murder, a

procedures murder, > Harry Roberts V. of Roberts death Roberts where the narrow category intent to lawful duties the or peace degree which Washington Even of even sentencing Stanislaus In Harry record specific first And fireman for supra. penalty is unconstitutional. his crimes and of the S.Ct. 1993 (1977); S.Ct. 3001 (1976) (1976). engaged in the performance of a d Carolina, of the offense drawn categories statute relates to consideration of the character a human being when the offender has to inflict great bodily harm upon, i.f the infirmity exists 3214 limits S.Ct. North S.Ct. 97 statute circumstances of 96 16 imposed to narrowly 96 1995 Woodson death penalty ,906 constitutional death penalty the å U.S. U.S. u.s. at imposition of unconstitutional, the officer who was said, 428 do not permit offender and a mandatory Louisiana, Louisiana, Court Louisiana or mandatory þe same killing to the is

es may be regarded a special interest peace incorrect of circumprovided all examples prior extreme ಹ exist victim was Circumstances of considered relevant in other guard of is any servants can which might attend the killing or reasonably believed it existence absence of to circumstances alcohol duties But are murder is lives in order order conduct There regular property. drugs, a police officer. as the youth of the offender, the al conviction, the influence of drugs, emotional disturbance, and even the that the circumstance, justification for his no mitigating his and 10 offender fact their peace officer performing other persons affording protection and which are the regularly must risk is the facts aggravated sure, that victim stances which mitigating þe suppose safety of when the "To

Because to either unconstitutional,' of consideration that its "As we emphasized repeatedly in Roberts\* and it companion cases decided last term, it is essential the capital sentencing decision allow for considera consideration relevant particular allow consi pe is it tal sentencing decision allow mitigating circumstances may factors, the not offender or does the Louisiana statute does particularized mitigating particular whatever

said: is S.Ct., where it before jury have 96 2958 of that the supra, at p. İs essential Texas, is "What , > Jurek See

individual about the information \*Stanislaus Roberts v. Louisiana, relevant possible

law . Texas will be determine. such must it nall fate that whose clearly assures adduced." defendant

oben constituleft person Harry D situation at pass supra, and law" d by might 2, d a Louisiana, killing footnote such such penalty that justify upon intentional 1995, > suggested death Roberts "a unique problem that may ď mandatory at Ct It supra, in Harry Š where based sentence. 16 Ø Louisiana, whether of Court 5, life footnote The muster question B > presents serving Roberts tional 1996,

Texas statutes circumstances penal , Jurek penalty death certain supra; death mitigating mandatory Florida, of constitutionality consideration of > the Proffitt down striking has upheld the which permitted supra; Although Georgia, Court statutes , Gregg supra the

circumstances The and of individually Constitution statutes scope of of mitigating the determination purpose and Texas them. in determining considered States to of the compared Florida United evidence and for pe circumstances willinstructive statutes the Georgia, þe for which then by states mandated those wi11 under the are three purposes mitigating statute under penalty are these received which procedures The Colorado of of appropriate evidence statutes evidence be the the

#### Florida:

with trial which jury bifurcated same the Ø for before provides place statute take to The Florida sentencing stage guilt. determined the

circumstance aggravating seven mitigating circumstances: eight contains statute The Florida following the and

of prior significant history defendant has no The defactivity. "(a) criminal a

defendant emotional the while Or committed of extreme mental was felony influence capital The the sturbance (b) under

a participant in the defendant's act. the victim was to consented The OL (c)

participation capital the in by another person and his accomplice minor. defendant acted under an defendant was committed The relatively (p) conduct felony

under OL duress another person. extreme of domination the substantial The (e)

crime." the the appreciate conduct impaired. conform his to defendant w was substantially is of the defendant to the of conduct capacity his condu requirements of law The criminality of

of statutes, cr. the of time supra, the Florida at 19//), rio Florida, 1976-1977) ° Proffitt of project (g) The age cc. 921.141(6) (Sup Footnote 6 of Pro Seco

exist...which outweigh include Florida statute, quoted in Proffitt v these consider aggravating (Conclusion to presented on must sentenced Supreme Court in Proffitt v. circumstances found to exist; and...(b)ased jury is directed to and pe specified sentencing and mitigating circumstances." (Emphasis added). "Evidence may considerations, whether the defendant should be sufficient mitigating circumstances certain legislatively relevant to The stage, 96 S.Ct.) the United States sentencing matter the judge deems or death." 2964 of to the relating (imprisonment) d d At aggravating "(w)hether supra, at stated by matters

aggravating Florida convincing trial court must trial court must then weigh circumstances in imposing Tedder v. statutory quoted in Proffitt v. statutory clear and insufficient reasonable person could differ," the sufficient should be so imposed, there are aggravating and mitigating 1975), that The is sentence death fact S.Ct. circumstances exist and that (Florida; findings of sentence of 96 a death of 910 2965 no ,806 virtually Ιŧ make written b° Ø suggesting at statutory So.2d sentence。 supra, that

facts

jury recommendation of life "...the

ø

following

sentence

majority

is by

In order to sustain

vote and is advisory only.

The jury determination

of 96 S.Ct.

2965

at po

supra,

Florida,

recommendation circumstances otherwise quoted jury consider of beyond death death. the the scope substantial Gregg statute, is and or aggravating circumstances if specify the exist to is circumstances only aggravating The binding introduce, recommendation impose jury is stage. to Georgia jury must S.Ct. imposed accorded found to ಡ guilt determining sentence, the imposes 96 evidence he may statutory elects evidence..." is pe mitigating of The the the defendant is circumstances sentence may its 2921 then adduced at jury supra。 if (10)p. or jury found The at the circumstances of Georgia, aggravating of supra, the death statute. aggravating evidence circumstances any supported by types law, and and the Georgia, In > case the doubt the law the and Gregg nonstatutory "any mitigating to supra. in statutory by Under Georgia sentence, be consider reasonable aggravating as authorized delineated may sentence. Gregg latitude Georgia, which Texas may the the of d

of types specific five to capital homicides serious homicides limits Texas especially

following with evidence which trial, the any relevant jury answer bifurcated same to the then required sentencing stage, ದ take place before for provides jury is statute the stage to At The Texas guilt. produced. questions: sentencing The determined pe three

deliberately death of that defendant committed the that the Was expectation of result; deceased conduct another would death of the reasonable the Whether with the Or the [] deceased caused

defendant constitute that the a probability that the of violence and to society; is commit criminal acts there threat Whether continuing (2) would

of conduct the evidence, whether the conduthe deceased was unreasonable on, if any, by the deceased." supra, Texas, by > Jurek provocation, the in (3) If raised by t defendant in killing quoted response to the statute, S.Ct. Texas of 96

imprisonment statutory mitigating conform court must findings eight statutory aggravating minor nonexistence of The inability the nature of the offense; the eighth relates capacity to appreciate wrongfulness of conduct or to relatively of 18, (2) (1973)and combination of ΙĘ the life exists (2) OL factors. exists, 16-11-103(2) of. conduct would cause and the age existence or The duress, (4) factors penalty in offense committed by another factors aggravating other imprisonment. under mitigating ø Seven of the C.R.S. crime involving death. Any statutory aggravating a verdict as to the of law, (3) (1) C.R.S. 16-11-103 (1973) defendant..." statutory mitigating and foresee that his to life summarized as: statutory another, to to requirements defendant a sentence prior conviction for the the no to render of þe the or participation death factors focus reasonably to none the a may of people in death. of of conduct factors

process defendant's personal background and at the age factors the an plurality criminal to OL of of the being under past contributions and background have time the Whether defendant is just 18 other course of of the the part Defendant's and and record the by than mental condition at thereof indispensable said Under the Colorado statute, in supra, Was His lack adult has no relevance. character character it Carolina, OL relevance. death, constitutionally remorse of the defendant's aspect of considered. of North penalty thereof has no his stances, other consideration only S.Ct:

to relevant significance accords no that process Y.

or mitigating of punish humankind. designated offense offense members to individual the ultimate subjected as particular of of compassionate but frailties the individual human beings, death. pe of firing the to Ø of of record diverse undifferentiated mass. of convicted the penalty in or the circumstances possibility and from consideration the character from persons of death the stemming infliction uniquely a11 the faceless, of treats offender excludes of blind not

suggesting defen use mitigating at sentencing determination mitigating prescribed individual evidence Direct Florida to arrive Florida that virtually facets the advisory determinative jury allow •H facts of to the plan of that the case, The many mitigating circumstances necessary to develop of side uniquely factors evidence Texas evidence an all the of narrow scope at sentencing of life imprisonment. capital a marked contrast Viewed from the other face of part convincing Colorado the Texas use find turn being the mitigating ಥ that of by which Direct important as can and the d introduction defendant statutory in standards jury uses juries in The it Georgia in and stage in imprisonment unless the process jury death penalty an clear differ. answers or presents relevance to is sentencing the Colorado's satisfy constitutional the Florida, Georgia available to death in jury SO and record of patterns. person could In Florida, latitude such death to be the of case part of the summary, ¢ the sentence questions, by human being have no impose in Colorado, by capital is Texas at substantial evidence of life sentence important which circumstances of character reasonable sentence, courts cannot Georgia and advisory sentence statutory evidence sentence to law the an rigid stage the by

constitutional range broad of possibility d be of to introduction presumed the to is given permit statute been to The statute Consideration has evidence. Colorado gating the struing miti of

unconstitutionality factors supra. constitute impermissible (1972)op S a11 The Sec People v. Prante, jury's function is to determine whether any of these mitigating would use evidence Any attempt to construe the statute to permit consideration and use of mitigating 493.P.2d 1083 factors. could put evidence in mitigation not relevant There would be no legitimate Roberts preserve its constitutionality if statutory mitigating factors also of Woodson It its explicit in authorizing presentation statutory mitigating and aggravating Stanislaus enactment. found unconstitutional only if Colo. 243, See and would is established beyond a reasonable doubt. S.Ct.; nullification. S.Ct. of the legislative Prante, 177 3007 of 96 pattern the statutory mitigating factors. of 96 or aggravating factors exist. evidence not relevant to the 2990 impermissible jury statutory be construed to See People v. Louisiana, supra, at p. supra, at p. amendment can be to the bearing on the statute is which the jury statute possible. Carolina, must Colorado

to cruel and unusual statute for the offense with punishment in violation of the Eighth and Fourteenth Amendments imposition of Whether of America. concluded that the defendant is charged would constitute the United States death sentence pursuant to Colorado Accordingly, it is Constitution of the

to unnecessary is standard higher Q imposes Constitution Colorado consider

sentencing contends but briefly Defendant has urged other bases upon which he permissible above considered expressed could not become a These will be conclusion of the case. sentence alternative in his in view death in detail

### Factors: Mitigating Statutory of Vagueness

2969 factors challenge and ď at the statutory mitigating raised said same Court circumstances was The The vague to be applied. supra. contends that similar mitigating Florida, for age, are too > Proffitt Defendant strikingly in S.Ct: rejected to of

hard, commonly may be tions and decisions m line-drawing than is nder in a lawsuit." these questions more linefact ಣ require of "While required

S 96 of 2957 at p. supra, Texas, Jurek v. See

jury the guide to standards death: objective the penalty of to provide οf sition Failure

stated imports objections to the availability evidence in mitigation, is unnecessarily to "depraved" separately factor seems States with þe or to failure to provide objective standards argument, considered above, aggravating final the United cruel Florida has substituted for standard and other objections crime which the an especially heinous, limitation of be vague is the The only construed, (1973).construed pitiless that "atrocious" is contended to C.R.S. 16-11-103(6)(i) factors. As so scope of appellate review, Except as defendant proof conscienceless or Court has the vagueness in victim, mitigating burden of the offense reasonably could be Supreme except the of allocation of argument variant of to statutory to the Florida committed standard, torturous manner." at his and

similar construed Proffitt knowingly duty standard SO found the guidance to those charged with the sentences in capital cases." as defendant See Gregg v. in The Court in Proffitt also ಡ that the provision, aggravating circumstance death to many persons,", standard that "the (1973).S.Ct. 2968 of 96 16-11-103(6)(h) appellate cannot say imposing impermissibly vague the great risk of penultimate 2938 of 96 S.Ct. for at p. "We inadequate provide C.R.S. supra, Court held that recommending or provides Florida,

considered Florida, question whether nonbinding sentencing recommendato be important threa proportionality review role on its aggravating of In imposing the death penalty decision, defendant woul this was appellate sentencing from courts stage to the validity of the Florida system in Proffitt continuing clear. legislative authority to review for proportionali availability in many cases would inhibit the appellate court sentencing appellate substantial statutory authority, and Texas too has appellate review of the jury's all sentences and elaborate the jury had the to determine in Colorado are not at that the commit acts of violence that would constitute a to the mitigating similar Under the Colorado system, the the the assuring proportionality of ä authority, the Court considered Georgia's 1.8 findings at briefs, a prediction of probabilities for ø there and comparison necessary ಗ state supreme court took jury makes Gregg v. Georgia, supra, in which to the validity of the procedure the appears that relevant specific in appellate review of jury degree murder trial pointed out In Florida, where they evidence initiative without It procedures for sentences, limited society, evaluation important tion, the given no includes

imposed on to for necessary assure infirm capriciously this OWN to extent view their the statute has been found at adequate guidelines the or procedure is will arbitrarily pursued to the absence of courts not be þe determination, Colorado appellate review Colorado appellate not fact that willdeath penalty will in view of this issue definite the and the of view reason, appeal, to how d

state compelling drastic d fulfills less B by penalty fulfilled death be not the could that show which 10

least interest the process is government sentence due substantive the death compelling that demonstrate that ď further argues to Defendant restrictive means state the

punishment the and that constitution was held it the supra, violate Georgia, invariably ° > Gregg does not In death Court of

crime selected the the to penalty select long as the penal disproportionate 2926 to ire the legislature possible so long as inhumane or disprope or ď, at S.Ct. severe penalty possi is not cruelly inhum involved." 96 S.Ct.

is Georgia extent constitutional well for murder under the procedure prescribed by the not to is Thus, defendant's argument, upon the United States Constitution, death penalty the hold went on to imposition. Court penalty founded

fundamental show constituti to attempt to proces analysis that compelling B to due fundamental life and Ø process d demonstrate under then proceeds infringement of realize due characterization scrutiny B substantive of to to Infringement the state analysis strict means support the Defendant urges a restrictive from the subjected to The requires to right. interest. interest proceeds This less constitutional be of right must ernment government analysis.

from murderers available declaration of of imposition of the course Such an analysis has been used by the means society least restrictive the Massachusetts in for the crime of murder committed Supreme Court in invalidating the to protect interest is not the under attempted rape government penalty deter murders. the death satisfy the death penalty Massachusetts an or

be course, construing The United States Supreme Court plurality has not to embark on such it Of and analysis in supra. view of the conclusion reached above, so absent the necessity therefor, Georgia, unnecessary such Gregg v. to adopt Colorado Constitution. It is courts are free such terms, in unwise to do analysis in Colorado

beyond proof of innocence: due process concepts of and presumption of

constitutionaffirmative of a preponderance to in the nse factors requiring the People i£ of position Nothing the penalty stage, is perceived including negation of Stanislaus Roberts line they have the burden to establish aggravating mitigating factors. Even aggravating circumstances burden by take the this proposition. burden can be borne by establishing such matters constitutional infirmity is Ø such from cases that The People stage. circumstances at doubt case, the sentencing Jurek, Woodson, of the existence of argues in establishing reasonable their support a requirement. defendant of eliminating mitigating directly in at element evidence, no a procedure beyond Proffitt, required to negate such that cited

is the Based upon the foregoing Memorandum Opinion, it imposition of for Colorado statutory procedures the

FOR AND AND KI PITKIN DISTRICT COURT OF. THE COUNTY THE ZI

Agtion No. Criminal

COLORADO

OF

STATE

OF STATE THE OF THE PEOPLE COLORADO,

Plaintiff,

XS

COUNSEL MOTION

ADVISORY

AS

ROBERT BUNDY, THEODORE

Defendant.

the issue to Advisory Counsel to the. Court to follows: Counsel this as moves Advisory as states his duties and thereof COMES NOW Kenneth Dresnet, within matter, relieving him of support in the in and defendant defendant Order an

- of be working as Defender Deputy and will d Public appointed 1978 State peen July 1, the has of effective Dresner office Pueblo Kenneth Defender the date. Public out of said
- represented due relieved originally Was matter but office Defender's the within of interest Public in defendant The conflict the
- to Kenneth Dresner Public State Deputy apply will as employment interest of of his conflict commencement Said Defender nodn

issue the 4 Court Counsel this requests that as Advisory duties WHEREFORE Kenneth Dresner relieving of his an Order

submitted, Respectfully

Defendant 81230 (Nam) Colorado Advisory Counsel 307 N. Main Gunnsion, Colorad

#### MAILING OF CERTIFICATE

the Within Motion the U.S. mail, the of t a copy o served a copy <u>ن</u> by placing addressed I have that ρχ e People Prepaid, certify the postage

80903 Milton Blakey
Assistant District Attorney
District Attorney's Office
20 East Vermijo, Suite 310
Colorado Springs, Colorado 80

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June,

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FOR AND AND THE DISTRICT COURT IN PITKIN PHO COUNTY

Action No. Criminal

COLORADO

OF

STATE

OF STATE Plaintiff, THE OF vs. PEOPLE THE PEOPLE COLORADO,

ADVISORY AS COUNSEL P. MOTION

BUNDY,

ROBERT

THEODORE

Defendant.

the to issue to Counsel the this Court to follows: Advisory Counsel as and moves Advisory as states his duties thereof Dresner, within matter, of support relieving him COMES NOW Kenneth in the defendant and in defendant Order

- State working Public Defender a Deputy pe will appointed and 1978 State has been 1, the Julyof effective Dresner the Pueblo office Kenneth Public Defender date. of said
- represented due relieved originally Was within matter but office Public Defender's the interest in defendant The of conflict 5
- Dresner Public Kenneth State apply to Deputy ď Will as employment interest of his conflict commencement of Said Defender 3 nodn

issue Court ç Counsel this that Advisory requests as duties Dresner of his Kenneth relieving WHEREFORE defendant. Order an

submitted, Respectfully

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Defendant 81230 Chum ssner #4628 Colorado Advisory Counsel 307 N. Main Dresner 307 N. Mai Gunnsion,

## OF MAILING CERTIFICATE

Motion mail, within U.S. the w of t a copy cof same served a copy **to:** that I have by placing , addressed that certify th ne People b e prepaid, postage nodn

Milton Blakey
Assistant District Attorney
District Attorney's Office
20 East Vermijo, Suite 310
Colorado Springs, Colorado 80903

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1978.

June,

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day

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#### COLORADO OF. STATE THE OF COURT SUPREME THE IN

) ) ORIGINAL PROCEEDING			) XADBERKXERON ) Court-vot	Countyx		
THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G. E. TUCKER, DISTRICT ATTORNEY,	Petitioners,	Δ.	No. 27963	THE DISTRICT COURT OF THE STATE OF	Respondents.	

Respondents 27 April the show 1978 the motion of 28, rule including APRIL said 40 that answer of BANC, and consideration ordered EN to file COURT, time, day within which THE this additional BY **:**t

Clerk Supreme Court

Aran TH Munl

Beputy Clerk

By

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Kenneth Dresner, Esq. 207 N. Main Gunnison, CO 81230 Milton Blakey,
Assistant District Attorney
Ninth Judicial District
District Attorney's Office
Aspen, CO 81611